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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products Liability
Litigation,

No. 2:15-MD-02641-DGC

**THE PARTIES' JOINT STATUS
REPORT FOR THE JANUARY 19,
2018 CASE MANAGEMENT
CONFERENCE**

1 In accordance with Paragraph G of Case Management Order No. 27 [Doc. 8133], the
 2 Parties hereby submit their Joint Status Report for the January 19, 2018 Case Management
 3 Conference.

4 **I. Discovery**

5 **A. MDL Common Discovery**

6 The Parties completed MDL common discovery on February 3, 2017. The following
 7 depositions have been completed:

8	December 15, 2015	30(b)(6) re FDA Warning Letter
9	January 11, 2016	Kay Fuller
10	January 20, 2016	Continued 30(b)(6) re FDA Warning Letter
11	March 18, 2016	30(b)(6) re corporate structure
12	April 27, 2016	30(b)(6) re ESI systems structure
13	May 3, 2016	Murray Asch, M.D.
14	May 11, 2016	Carol Vierling
15	May 17, 2016	Anne Bynon
16	May 24, 2016	Len DeCant
17	June 2, 2016	John DeFord
18	June 9, 2016	Bret Baird
19	June 16, 2016	Robert DeLeon
20	June 17, 2016	Joe DeJohn
21	July 18, 2016	Abithal Raji-Kubba
22	July 27, 2016	Bill Little
23	July 27, 2016	Judy Ludwig
24	July 29, 2016	John Wheeler
25	August 9, 2016	Maureen Uebelacker
26	August 16, 2016	Daniel Orms
27	August 19, 2016	Mary Edwards
28	August 24, 2016	Cindi Walcott

1	August 30, 2016	30(b)(6) re REACH program
2	September 7, 2016	Steve Williamson
3	September 7, 2016	30(b)(6) re Sales/Marketing
4	September 7, 2016	Kevin Shifrin
5	September 16, 2016	Jack Sullivan
6	September 19, 2016	Brian Doherty
7	September 23, 2016	Holly Glass
8	September 29, 2016	John Van Vleet
9	October 11, 2016	Chris Ganser
10	October 18, 2016	Natalie Wong
11	November 3, 2016	Jack Sullivan (continued)
12	November 11, 2016	Robert Cortelezzi
13	December 6, 2016	David Peeler, M.D.
14	January 4, 2017	John Kaufman, M.D.
15	January 18, 2017	Michael Randall - 30(b)(6) Meridian/Denali
16	January 18, 2017	Kim Romney
17	January 19, 2017	Robert Carr - 30(b)(6) Key Opinion Leaders
18	January 20, 2017	Scott Trerotola, M.D.
19	January 24, 2017	Scott Randall
20	January 25, 2017	Gary Cohen, M.D.
21	January 26, 2017	Chad Modra - 30(b)(6) Failure Rate Thresholds
22	January 26, 2017	Anthony Venbrux, M.D.
23	January 30, 2017	Frank Lynch, M.D.
24	January 31, 2017	Mark Wilson
25	February 1, 2017	William Stavropoulos, M.D.
26	February 2, 2017	Mike Randall
27	February 2, 2017	Kevin Boyle
28	June 6, 2017	Rob Carr (Preemption Declaration)

B. MDL Expert Disclosure and Discovery

Plaintiffs made their initial disclosures of expert witnesses on March 3, 2017, and their initial disclosures relating to the Meridian and Denali devices on April 7, 2017.

Those disclosures included the following witnesses:

David W. Bates, M.D., MSc

Rebecca Betensky, Ph.D.

Mark J. Eisenberg, M.D.

David Garcia, M.D.

Steven M. Hertz, M.D.

Sanjeeva Kalva M.D.

David A. Kessler, M.D.

Thomas Kinney, M.D., M.S.M.E.

Robert M. McMeeking, Ph.D., NAE, FREng, FRSE, LFASME

Robert O. Ritchie, Ph.D.

Suzanne Parisian, M.D.

Anne Christine Roberts, M.D.

Michael B. Streiff, M.D.

Robert L. Vogelzang, M.D.

Defendants made their initial disclosures of expert witnesses on April 14, 2017, and their initial disclosures relating to the Meridian and Denali devices on May 12, 2017.

Those disclosures included the following witnesses:

Christine L. Brauer, Ph.D.

Paul Briant, Ph.D., P.E.

Audrey A. Fasching, Ph.D., P.E.

David W. Feigal, Jr., M.D., M.P.H.

Clement J. Grassi, M.D.

Mark W. Moritz, M.D.

Christopher S. Morris, M.D.

1 Frederick B. Rogers, M.D., FACS

2 Moni Stein, M.D., FSIR

3 Ronald A. Thisted, Ph.D.

4 Donna Bea Tillman, Ph.D., M.P.A.

5 Plaintiffs made their rebuttal disclosures of expert witnesses on May 12, 2017.

6 Those disclosures included the following witnesses:

7 Rebecca Betensky, Ph.D.

8 Kush Desai, M.D.

9 Mark J. Eisenberg, M.D.

10 Steven M. Hertz, M.D.

11 Robert M. McMeeking, Ph.D.

12 Robert O. Ritchie, Ph.D.

13 Robert L. Vogelzang, M.D.

14 The following expert depositions have been taken:

15 May 9, 2017 David W. Bates, M.D., MSc (class-action)

16 May 16, 2017 Steven M. Hertz, M.D. (class-action)

17 May 17, 2017 Christopher S. Morris, M.D.

18 June 5, 2017 Robert L. Vogelzang, M.D.

19 June 6, 2017 Kush Desai, M.D.

20 June 9, 2017 Robert O. Ritchie, Ph.D.

21 June 15, 2017 Clement J. Grassi, M.D.

22 June 17, 2017 Thomas Kinney, M.D., M.S., M.E.

23 June 21, 2017 David L. Garcia, M.D.

24 June 21, 2017 Suzanne Parisian, M.D.

25 June 21, 2017 Anne Christine Roberts, M.D.

26 June 23, 2017 Rebecca Betensky, Ph.D.

27 June 26, 2017 Audrey Fasching, Ph.D., PE

28 July 6, 2017 Mark J. Eisenberg, M.D., MPH, FACC, FAHA

1	July 6, 2017	Robert M. McMeeking, Ph.D., NAE, FEng, FRSE, LFASME
2		
3	July 7, 2017	Anne Christine Roberts, M.D.
4	July 11, 2017	Sanjeeva Kalva, M.D.
5	July 12, 2017	Michael B. Streiff, M.D.
6	July 13, 2017	Paul Briant, Ph.D, PE
7	July 18, 2017	Mark W. Moritz, M.D.
8	July 18, 2017	Frederick B. Rogers, M.D., MS, FACS
9	July 20, 2017	David W. Feigal, Jr., M.D., MPH
10	July 21, 2017	Darren R. Hurst, M.D.
11	July 24, 2017	Derek D. Muehrcke, M.D.
12	July 25, 2017	Christopher S. Morris, M.D.
13	July 26, 2017	J. Matthew Sims, MC, MS
14	July 26, 2017	Kenneth Herbst, M.D.
15	July 28, 2017	Ronald A. Thisted, Ph.D.
16	July 31, 2017	David A. Kessler, M.D.
17	July 31, 2017	Moni Stein, M.D.
18	August 2, 2017	Christine L. Brauer, M.D., Ph.D.
19	August 3, 2017	Paul Briant, Ph.D., PE
20	August 3, 2017	Audrey Fasching, Ph.D.
21	August 3, 2017	David S. Poll, M.D.
22	August 4, 2017	Robert O. Ritchie, Ph.D.
23	August 4, 2017	Donna Bea Tillman, Ph.D.MPA, FRAPS
24	August 16, 2017	Lora K. White, RN, BSN, CCM, CNLCP
25	August 25, 2017	Daniel Cousin, M.D.
26	September 29, 2017	Piotr Sobieszczyk, M.D.
27		
28		

1 **C. Barazza Class Action Discovery**

2 The Parties completed the depositions of the named plaintiffs. The following
3 depositions were taken:

4 October 19, 2016	Diane Washington
5 October 28, 2016	James Holt
6 November 10, 2016	Gregory Lester
7 November 16, 2016	Maria Barazza
8 November 30, 2016	Edward Mims
9 December 1, 2016	Nancy Mosher
10 December 6, 2016	Thomas Flournay
11 December 6, 2016	Delmar Lee Peck
12 December 15, 2016	Denise Tomlin
13 January 24, 2017	John Van Vleet
14 February 27, 2017	Linda Walker
15 May 11, 2017	Ana Hernandez

16 The Parties designated and disclosed experts on class certification issues, including
17 Plaintiffs' rebuttal expert reports. Many of those class certification experts were also the
18 same experts in the general MDL and were deposed at the same time for both the MDL
19 and the class action.

20 **D. Bellwether Group 1 Depositions**

21 **1. Fact Discovery**

22 In addition to the numerous fact witness depositions taken by the Parties before the
23 last status conference, the Parties have scheduled or have already taken the following fact
24 witness depositions in the five bellwether cases since that status conference:

25 May 31, 2017	Angelic Thompson (Mulkey)
26 May 31, 2017	Lorelie Thompson (Mulkey)
27 May 31, 2017	Torin Walters, M.D. (Mulkey)
28 June 1, 2017	Pho Nguyen, M.D. (Mulkey)

1	June 15, 2017	Brandon Kang, M.D. (Booker)
2	June 20, 2017	Richard Harvey, M.D. (Booker)
3	June 26, 2017	Eric Hairston (Booker)
4	June 27, 2017	Brody Puckett (Kruse, postponed due to illness)
5	July 7, 2017	Amy Sparks, M.D. (Hyde)
6	July 11, 2017	Colleen Taylor, M.D. (Jones)
7	July 12, 2017	Aaron Donner (Mulkey)
8	August 3, 2017	Chris Smith (Jones)
9	August 15, 2017	Bryan Vogel (Booker and Kruse)
10	August 23, 2017	Tim Hug (Hyde)

11 Per CMO 25 (Doc. 6227), the deadline for deposing medical witnesses (treating
 12 physicians) was August 7, 2017, and the deadline for deposing all other fact witnesses was
 13 August 15, 2017.

14 **2. Case-Specific Expert Disclosures and Discovery**

15 On June 5, 2017, Plaintiffs disclosed case-specific expert reports by the following
 16 expert witnesses in all five bellwether cases:

17 Darren Hurst, M.D.

18 Derek D. Muehrcke, M.D.

19 On June 5, 2107, Plaintiffs disclosed the case-specific expert report of David
 20 Garcia, M.D. in the Jones bellwether case.

21 On June 9, 2017, in accordance with the agreement of the Parties, Plaintiffs
 22 disclosed case-specific expert reports by Robert M. McMeeking, Ph.D., NAE, FREng,
 23 FRSE, LFASME in all five bellwether cases.

24 On June 12, 2017, in accordance with the agreement of the Parties, Plaintiffs
 25 disclosed case-specific expert reports by the following expert witnesses in all five
 26 bellwether cases:

27 Robert O. Ritchie, Ph.D.

1 J. Matthew Sims, MC, MS & Lora K. White, RN, BSN, CNLCP, CCM,
2 MSCC

3 On July 3, 2017, Defendants disclosed case-specific expert reports for the
4 following expert witnesses:

5 Kenneth D. Herbst, M.D.

6 Mark W. Moritz, M.D.

7 Christopher S. Morris, M.D.

8 Moni Stein, M.D., FSIR

9 On July 13, 2017, in accordance with agreement of the parties, Defendants
10 disclosed case-specific expert reports for the following expert witnesses:

11 Audrey A. Fasching, Ph.D.

12 Paul Briant, Ph.D

13 Daniel Cousin, M.D.

14 David Poll, M.D.

15 Piotr Sobieszczyk, M.D.

16 All general MDL deposition discovery and all depositions related to the initial five
17 bellwether cases have been completed (subject to this Court's resolution of the disputes
18 identified below).

19 **II. Science Day Procedure**

20 The Parties made their Science Day presentations on October 5, 2019 as described
21 in CMO 27.

22 **III. Summary Judgment and Daubert Motions**

23 The Parties filed their *Daubert* and summary judgment motions in accordance with
24 CMO 23 and this Court's August 31, 2017, Order [Doc. 7368]. The Court has heard and
25 submitted its rulings on the following motions argued on November 17, 2017 and December
26 15, 2017.

- 27 • Defendants' Motion and Memorandum in Support of Motion for Summary
28 Regarding Preemption

- Defendants' Motion and Memorandum in Support of Motion for Partial Summary Judgment of Plaintiff SherrUna Booker's Claims (Docs. 7456 and 8163)
- Defendants' Motion and Memorandum in Support of Motion to Disqualify Robert Vogelzang, M.D. and Kush Desai, M.D. as Testifying Experts; and Scott Resnick, M.D. and Robert Lewandowski, M.D. as Consulting Experts for Plaintiffs (Docs. 6678, 7029, and 7058);
- Defendants' Motion and Memorandum in Support of Motion to Disqualify Thomas Kinney, M.D. as an Expert for Plaintiffs (Docs. 5677, 5803, and 5879);
- Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc.'s Motion and Incorporated Memorandum to Exclude (Daubert) the Opinions of David Kessler, M.D. and Memorandum of Law in Support (Docs. 7309 and 7805);
- Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc.'s Motion and Incorporated Memorandum to Exclude (Daubert) the Opinions of Suzanne Parisian, M.D. and Memorandum of Law in Support (Docs. 7308 and 7814).
- Defendants C. R. Bard, Inc.'s and Bard Peripheral Vascular, Inc.'s Motion to Exclude (Daubert) the Opinions of Thomas Kinney, M.D., Anne Christine Roberts, M.D., and Sanjeeva Kalva, M.D. and Memorandum of Law in Support (Docs. 7296, and 7812)

In accordance with the Court's Order dated January 4, 2018, Plaintiffs are ready to argue the following motions on January 19, 2018:

1. Defendants C. R. Bard Inc.'s and Bard Peripheral Vascular, Inc.'s Motion to Exclude (*Daubert*) the Opinions of Derek R. Muehrcke, M.D. and Memorandum of Law in Support (Docs. 7304 and 7813)
2. Defendants C. R. Bard Inc.'s and Bard Peripheral Vascular, Inc.'s Motion to Exclude (*Daubert*) the Opinions of Darren R. Hurst, M.D., and Supporting Memorandum of Law (Docs. 7302 and 7811);
3. Defendants C. R. Bard Inc.'s and Bard Peripheral Vascular, Inc.'s Motion to Exclude (*Daubert*) the Opinions of Mark J. Eisenberg, M.D. and Memorandum of Law in Support (Docs. 7291 and 7810);
4. Defendants C. R. Bard Inc.'s and Bard Peripheral Vascular, Inc.'s Motion to Exclude the Opinions of Rebecca Betensky, Ph.D. and Memorandum of Law in Support (Docs. 7288 and 7809);

1 **IV. Pre-Trial Motion Practice**

2 **A. Plaintiffs' "Cisson FDA" Motion *in Limine***

3 **Plaintiffs' Position**

4 Plaintiffs filed their "Cisson FDA" motion *in limine* seeking exclusion of certain
5 FDA-related evidence in accordance with the Court's Case Management Order No. 29 on
6 January 2, 2018 (Doc. 9529). Plaintiffs request a date for oral argument at the Court's
7 earliest possible convenience in order to assist trial preparation.

8 **Defendants' Position**

9 The Defendants stand ready to present oral argument if the Court believes it would
10 be beneficial.

11 **B. Plaintiffs' Motion in Limine re: Non-Party Fault Specific to Booker**

12 **Plaintiffs' Position**

13 Plaintiff Booker intends to file a motion *in limine* to exclude certain evidence related
14 to Defendants' Notice of Non-Party Fault under O.C.G.A. § 51-12-33(d) filed on November
15 13, 2017. Plaintiffs request relief from the current three page limit on motions *in limine*,
16 and not to exceed five pages.

17 **Defendants' Position**

18 The Defendants have no objection to the Plaintiffs' request.

19 **C. Defendants' Motion in Limine**

20 **Defendants' Position**

21 During the status conference held on November 17, 2017, the Court and the parties
22 discussed motions in limine for the upcoming bellwether trials. At that time, the Plaintiffs
23 indicated their desire to file one motion (referred to as the **Cisson** motion) exceeding the
24 Court's customary page limitations for motions in limine. In turn, the Defendants indicated
25 that they also had one motion that they wished to file with an expanded page limitation.
26 Thereafter, the Court entered Case Management Order No. 28 (Doc. No. 8871). In that
27 order, the Court stated that "[e]ach side indicated that it wishes to file one motion in limine
28 longer than 3 pages. Permission is granted for one such motion from each side."

1 In Case Management Order No. 29 (Doc. No.9415), the Court set a briefing schedule
 2 for the Plaintiffs' "**Cisson**" motion, and established expanded page limitations for that
 3 motion. However, the Court did not mention or address in that order the motion in limine
 4 that the Defendants wish to file in excess of the Court's customary page limitations. Bard
 5 respectfully requests that the Court provide it with the same expanded page limitations
 6 (including a short reply brief) afforded the Plaintiffs regarding their **Cisson** motion for one
 7 of its motions in limine.

8 **Plaintiffs' Position**

9 The Plaintiffs have no objection to applying the same protocol established for the
 10 *Cisson* motion to one of the Defendants' motions *in limine*.

11 **D. Motion for Bifurcation**

12 **Plaintiffs' Position**

13 The decision to receive briefing and set scheduling on any matter is solely in the
 14 Court's discretion.

15 **Defendants' Position**

16 Both of the initial two bellwether cases (**Booker** and **Jones**) will be governed by
 17 Georgia substantive law. Georgia's punitive damages statute (O.C.G.A. sec. 51-12-5.1(d)
 18 and (e)) calls for a bifurcated proceeding when a claim for punitive damages is asserted.
 19 While the application of this statute in a federal court raises some complicated legal
 20 questions, at least two other MDL courts – in the context of trying bellwether cases premised
 21 on Georgia law – have applied the statute. *See In re Mentor Corp. ObTape Transobturator*
 22 *Sling Prod. Liab. Litig.*, No. 3:07-CV-00101, 2010 WL 1998166, at *2 (M.D. Ga. May 18,
 23 2010); *see also Cisson v. C. R. Bard, Inc.*, No. 2:11-CV-00195, 2015 WL 251437, at *4
 24 (S.D.W.Va. Jan. 20, 2015), *aff'd sub nom. In re C. R. Bard, Inc.*, MDL No. 2187, *Pelvic*
 25 *Repair Sys. Prod. Liab. Litig.*, 810 F.3d 913 (4th Cir. 2016). Bard therefore requests a
 26 briefing schedule for the filing of a motion to bifurcate to present this issue to the Court for
 27 decision.
 28

By way of background, Georgia law provides that, during the primary trial, “the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made.” *See* O.C.G.A. sec. 51-12-5.1(d). If the trier of fact determines that there is clear and convincing evidence to support an award of punitive damages, a second phase of the trial is convened to “receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case.” *See* O.C.G.A. sec. 51-12-5.1 (e). Typically, that second phase (if held) is brief, involving short evidentiary presentations of a defendant’s net worth (or similar proof), and short additional arguments.

Bard asks that the Court establish a briefing schedule that will permit the parties to fully brief this issue prior to the pre-trial conference, with the expectation that the issue can be addressed at that time.

E. Discovery Relating to Second Phase of Trial

Plaintiffs’ Position

Plaintiffs seek discovery to establish current evidence of defendants’ net worth and any other “such evidence as is relevant to a decision regarding the amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case.” *See* O.C.G.A. sec. 51-12-5.1(e).

Said discovery would include requests for the following category of documents: General Ledgers, Income statements, Balance sheets, Annual reports, consolidated financial statements, including working copies, cash flow statements, and detail budget variance reports. Plaintiffs also seek an appropriate defendant representative be produced for a two hour deposition to inquire regarding said documents.

Plaintiffs seek this discovery prior to the start of the *Booker* bellwether trial as currently scheduled to commence on March 14, 2018.

Defendants’ Position

The Defendants object to the Plaintiffs’ attempt to re-open fact discovery on the eve of the first bellwether trial. Under the applicable case management order, general fact

discovery closed on February 3, 2017. In turn, fact discovery specific to the five bellwether cases concluded in August of 2017. Despite those deadlines, and despite ample notice of the potential relevance of the information, the Plaintiffs waited until now to make their request. The Plaintiffs should not be permitted to disrupt the Defendants' trial preparation efforts this close to trial, when they had ample past opportunities to accomplish the additional discovery they are now seeking.

RESPECTFULLY SUBMITTED this 12th day of January 2018.

GALLAGHER & KENNEDY, P.A.

SNELL & WILMER L.L.P.

By: /s/ Mark S. O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

/s/ Gay Mennuti